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Supreme Court, U.S.
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No. 94-942

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

UNITED WORLD TRADE, INC.,
Petitioner,

vs.

MANGYSHLAKNEFT OIL PRODUCTION ASSOCIATION, KAZAKHSTAN COMMERCE FOREIGN ECONOMIC ASSOCIATION, and MINISTRY OF ENERGY AND FUEL RESOURCES OF KAZAKHSTAN REPUBLIC,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

In respondents' view, the question sought to be presented by petitioner, correctly restated with respect to this record is as follows:

1. Whether federal district courts have subject matter jurisdiction over a dispute arising from a foreign sovereign's alleged breach of contract where (a) the plaintiff buyer is a United States corporation but the contract did not require performance by either party in the United States; (b) payment was made in U.S. dollars by buyer's foreign bank in London to the foreign sovereign in Paris; and (c) the sole effect in the United States of the alleged breach is that a non-party U.S. bank will not receive commissions for converting contractual payments from foreign to United States currency?

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INTRODUCTION

Under the Foreign Sovereign Immunities Act ("FSIA"), a foreign sovereign forfeits its presumed immunity and United States courts have subject matter jurisdiction if the claim for relief is based on an act of the sovereign outside of the United States "in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." 28 U.S.C.A. § 1605(a)(2) (1994).

The petition argues that the required "direct effect in the United States" exists when the commercial transaction at issue requires payment to the sovereign in U.S. dollars, even though the dollars paid are transmitted from buyer's non-U.S. bank in London to seller's non-U.S. bank in Paris. The only "effect" upon which this significant expansion of subject matter jurisdiction depends is the loss -- by a U.S. bank which is not a party to the contract and which is selected by buyer's London bank -- of commissions that buyer (petitioner) would otherwise pay for converting buyer's foreign funds into U.S. dollars for ultimate payment to the sovereign overseas.

No conflict exists among the circuits, for no circuit court has made a finding of direct effect based upon such an attenuated connection between the breach and its alleged consequences in the United States. Nor is there any need for this Court to revisit Republic of Argentina v. Weltover, Inc., 112 S. Ct. 2160 (1992). The court of appeals properly adhered to and correctly applied Weltover's interpretation of the direct effect requirement. In essence, petitioner seeks appellate review of the court of appeals application of Weltover, a wholly inadequate basis for certiorari review.

The petition also seeks review on grounds that petitioner allegedly was required to give its Italian purchaser a contractual guaranty as a result of petitioner's failure to perform under its contract with the purchaser. Pet. at i, Question 3; id. at 15. In fact, petitioner's purchaser rejected petitioner's proffered guaranty and insisted on receiving security from one of the respondents. Because there is no factual predicate for petitioner's third question, it furnishes no basis for certiorari review.

STATEMENT OF THE CASE

A. Factual Background.

On December 16, 1991, the Republic of Kazakhstan became a sovereign state, independent of the Union of Soviet Socialist Republics. Two of the respondents, the Mangyshlakneft Oil Production Association ("MOP") and Kazakhstan Commerce Foreign Economic Association ("Kazcom" or "KCFEA"), which were instrumentalities of the Soviet government, survived the transition. The third respondent, the Ministry of Energy and Fuel Resources of the Republic of Kazakhstan ("Ministry") did not come into existence until February 7, 1992, after the agreements at issue had been negotiated and executed, and performance had commenced. It is undisputed that each of the respondents is an agency, instrumentality, or political subdivision of the Republic of Kazakhstan, and is entitled to sovereign immunity under the FSIA, 28 U.S.C.A. §§ 1603(a) and (b) (1994).

B. UWT's Claims.

Petitioner UWT's claims arose from MOP's alleged breach of two separate contracts between UWT and certain of the respondents.[1]

1. MOP's Alleged Breach Of The Preliminary Agreement.

The Preliminary Agreement, between UWT, MOP and Kazcom, was the basis for UWT's first claim of breach. UWT alleged that it had fulfilled its obligations under this Agreement by finding a buyer, ISAB, an Italian refinery, for 200,000 metric tons (MT) of respondents' oil. UWT

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[1]The record establishes no factual basis for UWT's breach of contract claims against the Ministry and Kazcom. As to the Ministry, UWT pleaded on information and belief that the Ministry had assumed MOP's obligations under the Preliminary Agreement and the Crude Oil Contract. The Ministry filed an affidavit expressly denying this allegation, and UWT failed to refute this proof. As to Kazcom, UWT could not identify any contractual obligations owed or breached by Kazcom. These are additional grounds available to these respondents to support affirmance if the Court were to grant certiorari. See infra at 6 n.2.

claimed that the Agreement required MOP to sell UWT an additional 800,000 MT of oil during the remainder of the year, and that MOP had failed to do so. The Preliminary Agreement made no reference to the United States, any U.S. bank, or U.S. dollars. To establish that MOP's alleged breach had a "direct effect in the United States", UWT asserted that the sales of the remaining oil would have occurred in a manner similar to the sales of the first 200,000 MT. The latter sales were made pursuant to a January 23, 1992 Contract for Sale of Crude Oil. The petition contains several inaccuracies concerning the terms of the Crude Oil Contract and the parties' performance thereunder.

The Crude Oil Contract, between MOP as seller and UWT and Kazcom as buyers, provided that the first 200,000 MT of oil would be sold in four separate shipments. The payment provision of the Crude Oil Contract required UWT to obtain a letter of credit in favor of MOP from "a first class European/U.S.A. bank." The parties' performance was as follows:

1. UWT selected the London Branch of the Instituto Bancario San Paolo di Torino S.P.A. and caused it to issue a letter of credit in favor of MOP;

2. The London branch of the San Paolo Bank notified Kazvnesheconombank in Almaty, Kazakhstan, via Barclay's Bank in London of the issuance of the letter of credit;

3. Kazvnesheconombank notified MOP of the posting of the letter of credit;

4. MOP delivered oil via pipeline from Kazakhstan to UWT at the Black Sea port of Novorossiysk for loading onto tankers, which delivered the oil to ISAB's refinery in Sicily;

5. MOP sent the shipping documents through Kazvnesheconombank to the London branch of the San Paolo Bank;

6. Upon presentation of the shipping documents, the London branch of the San Paolo Bank made payment in favor of MOP to Kazvnesheconombank's account with Credit Commercial de France in Paris.

UWT asserts that "[t]he designation of a European/U.S.A. bank as the means of achieving payment between UWT and the Respondents was an integral and necessary part of the transaction." Pet. at 7; accord id. at 14. In fact, the Crude Oil Contract contained no requirement that the European bank that UWT selected have a presence in the United States. UWT's assertion that the "unrebutted testimony, supported by the [Crude Oil] Contract itself, established that the transaction between UWT and Respondents could only occur if . . . a U.S. bank was involved," Pet. at 14, is equally erroneous. There is no record support for UWT's assertion that the transaction "could only occur" in this fashion; UWT itself chose the San Paolo Bank in London to play the key role. While UWT filed an affidavit asserting that the parties' intent was to use a U.S. bank for making payments to MOP, respondents filed an affidavit expressly denying that this was the parties' intent. In any event, nothing in the Crude Oil Contract required UWT to involve a United States bank; UWT could have obtained payment from ISAB in U.S. dollars or the San Paolo Bank in London could have arranged for a non-U.S. bank to convert the funds to U.S. dollars, avoiding any need for a U.S. bank to make the conversion.

Instead, UWT chose to accept payment from ISAB in lira; the San Paolo Bank in London then arranged for conversion of those funds into U.S. dollars. The conversion took place as follows: ISAB transmitted payment in lira to UWT's account in the San Paolo Bank in London; that bank transferred the lira to its branch in New York; for a fee paid by UWT, the San Paolo Bank's New York branch had a U.S. bank (Citibank) convert the lira into U.S. dollars; Citibank returned the funds to the San Paolo Bank's New York branch; and the New York branch transferred them to the London branch, which transmitted them to MOP's bank in Paris in payment for the Kazakh oil.

There is no record support for the assertion that "[o]nce converted into U.S. dollars, Citibank transferred 97 percent of the proceeds to MOP's bank in Paris . . . ." Pet. at 7. Rather, Citibank returned the funds to the San Paolo Bank's New York branch, which, in turn, transferred the funds to UWT's account at the San Paolo Bank in London. That bank then transmitted them to MOP's Paris bank.

UWT asserts that

> It was UWT's and Respondents' customary practice to use the New York branch of the San Paolo Bank, as well as

> Citibank, New York, to convert the oil payments into U.S. dollars and to distribute those proceeds to the parties. Whether the Contract required the use of New York banks is not germane, because the parties actually employed the services of these banks over a period of time.

Pet. at 14 (emphasis in the original). In fact, none of the respondents used New York banks for anything; the "practice" UWT is describing was solely the San Paolo Bank's on behalf of UWT, taken unilaterally without any knowledge or participation by respondents.

UWT's allegation that the breach of the Preliminary Agreement caused a "direct effect in the United States" was premised on a series of assumptions concerning the terms on which future sales of oil would have been made. UWT assumed that such future sales would have been made on the terms, including the requirement of payment in U.S. dollars, set forth in the Crude Oil Contract and the parties' performance thereunder; that the San Paolo Bank in London would have accepted payment from UWT's purchaser in foreign currency; that the San Paolo Bank in London would have followed the same practice for converting that currency into U.S. dollars, thereby paying Citibank or some other U.S. bank a fee for doing the conversion; and that upon breach by MOP, Citibank would lose its conversion fees.

2. MOP's Alleged Breach Of The Crude Oil Contract.

UWT also alleged that respondents lost the original bill of lading for the third shipment. UWT therefore could furnish only a copy of the bill of lading to its Italian purchaser, ISAB. UWT's failure to produce the original bill was a breach of UWT's contract with ISAB.

To the extent the petition suggests that MOP failed to deliver the full 200,000 MT of oil required under the Crude Oil Contract, and that UWT did not receive payment for the third and fourth shipments of oil under the Contract, Pet. at 7-8, it is erroneous. MOP's performance was not halted after the third shipment; the fourth and final shipment of oil under the Contract occurred without incident. In addition, ISAB paid UWT in full for both shipments. UWT, however, failed to pay MOP the $5,313,369.84 UWT owed for the third shipment and withheld $694,167.62 of the $3,991,008.37 it owed MOP for the fourth shipment.

The payments from ISAB to UWT for the third and fourth shipments presumably were converted into U.S. dollars in accordance with UWT's alleged practice. In any event, UWT did not allege that any activity of respondents would have prevented such conversion. Thus, as to this claimed breach of the Crude Oil Contract, UWT did not contend that any act of MOP had any effect on UWT's conversion of funds under the Crude Oil Contract.

Rather, UWT claimed that the "direct effect" of MOP's failure to supply the original bill of lading for the third shipment was that "UWT had to issue a contractual guaranty to indemnify the refinery against potential third-party claims . . . ." Pet. at 7. While UWT's affidavits showed that UWT offered to give ISAB such a guaranty, MOP's unrefuted evidence demonstrated that ISAB rejected this offer. MOP's evidence also showed that ISAB sought and obtained a letter of indemnity from the Ministry, after which ISAB paid UWT for the oil -- a payment that UWT still has not remitted to MOP. See supra at 5.[2]

REASONS FOR DENYING CERTIORARI

The court of appeals decision rests on a straightforward, correct application of this Court's holding in Republic of Argentina v. Weltover, Inc., 112 S. Ct. 2160 (1992), to the unique facts of this case. Petitioner's arguments to the contrary misread Weltover, the court of appeals decision, or the record, and, in any event, require facts that are not present here. The court of appeals decision creates no conflict with a decision of any other circuit court; indeed, the decision is fully consistent with other circuit court rulings. The petition should be denied.[3]

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[2]The dispute concerning payment to MOP for the third and fourth shipments is currently the subject of an arbitration proceeding in London, governed by English law, pursuant to the Crude Oil Contract.

[3]The court of appeals did not reach the other grounds, i.e., lack of personal jurisdiction and improper venue, that the district court had found to warrant dismissal. App. at 2 n.1. If certiorari were granted, these other grounds would be available here as alternative independent grounds to support the judgment of the court of appeals. See, e.g., Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 38-39 (1989); United States v. Arthur Young & Co., 465 U.S. 805, 814 n.12 (1984); Blum v. Bacon, 457 U.S.

(continued...)

I.

Much of the petition misapprehends Weltover, the court of appeals decision, or the record. For instance, petitioner's principal argument is that the court of appeals "read this Court's decisions in Weltover to require that the foreign sovereign's place of performance must be in the United States for courts to have jurisdiction under the FSIA." Pet. at 9. The court of appeals simply distinguished Weltover on this basis, noting that here, the performance of all parties to the contract, including that of respondents, was to occur outside the United States. App. at 10, 11. Drawing this obvious factual distinction falls far short of reading Weltover to impose such a requirement.

The petition also claims that Weltover is indistinguishable because "money which should have been converted into U.S. dollars and then distributed to UWT and Respondents by New York banks (with resulting commissions and fees to the bank) was not forthcoming." Pet. at 11. This argument misstates the terms of the Crude Oil Contract. That Contract did not require U.S. banks to convert funds into U.S. dollars and distribute them to UWT and respondents. In international business transactions such as this, U.S. dollars are a widely accepted currency, readily obtainable throughout the world. UWT, on its own, chose to accept payment from its purchaser in foreign funds and UWT's bank, the San Paolo Bank in London, chose to have those funds converted into U.S. dollars by a U.S. bank, thereby involving Citibank in New York.

The court of appeals concluded correctly that the cessation of UWT's voluntarily chosen means of procuring U.S. dollars was not "'an immediate consequence of the defendant's . . . activity.'" App. at 11 (quoting Weltover, 112 S. Ct. at 2168). By this ruling, the court of appeals gave effect to the plain language of the FSIA, which requires a showing that the foreign sovereign's act on which the claim is based – not an act of the plaintiff – caused a direct effect in the United States. 28 U.S.C.A. § 1605(a)(2); App. at 11-12 & n.4. This ruling is fully consistent with how this Court and other circuit courts have applied the "direct effect" requirement. Weltover, 112 S. Ct. at 2168-69; Commercial Bank

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[3](...continued)
132, 137 n.5 (1982). Moreover, any issues not resolved in this Court would remain open for resolution in the court of appeals.

of Kuwait v. Rafidain Bank, 15 F.3d 238, 241 (2d Cir. 1994); Antares Aircraft, L.P. v. Federal Republic of Nigeria, 999 F.2d 33, 35 (2d Cir. 1993); Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300, 312 (2d Cir. 1981), cert. denied, 454 U.S. 1148 (1982); General Electric Capital Corp. v. Grossman, 991 F.2d 1376, 1385 (8th Cir. 1993).

In petitioner's view, "Weltover [held] that the disruption of payments through banks in the United States satisfied the 'direct effect' requirement." Pet. at 11-12. Weltover itself refutes this overbroad, oversimplified reading. In Weltover, the foreign sovereign, at the choice of the plaintiffs, was contractually obligated to make "payments through [a] bank[ ] in the United States." Pet. at 11-12; Weltover, 112 S. Ct. at 2168. Hence, the sovereign's breach of that obligation "necessarily had a 'direct effect' in the United States." Weltover, 112 S. Ct. at 2168. Here, by contrast, there was no contractual obligation to make payments through banks in the United States. In fact, no payments were made through such banks; the payments were made through banks in London and Paris.

Apparently attempting to create a conflict among circuits, petitioner looks to the concurring opinion in Goodman Holdings v. Rafidain Bank, 26 F.3d 1143, 1146-47 (D.C. Cir. 1994) (Wald, J., concurring). Goodman fully supports, rather than conflicts with, the court of appeals decision. In Goodman, the contractual obligation at issue was payment under letters of credit issued by banks that were branches of the Iraqi government. 26 F.3d at 1144. Payment was not required to be made in the United States or from funds on deposit in the United States, even though the bank often had in fact used such United States funds. Goodman found that the requisite "direct effect in the United States" did not exist and therefore, neither did subject matter jurisdiction. 26 F.3d at 1145. This ruling is fully consistent with the court of appeals decision in this case.

Petitioner argues that under "the parameters set out" by the concurring opinion in Goodman, the direct effect requirement was met in this case. Pet. at 14. Even if this Court were to adopt those parameters, they would not alter the result here. For instance, the concurring opinion would find a "direct effect" where the contract specifically required funds to be channeled through the United States, the breach prevented the funds from reaching their intended destination, and the funds therefore remained in the United States accounts. 26 F.3d at 1147. In the instant case there

was no such express requirement of the sovereign; none of the respondents had any obligation to send any oil sales proceeds through the United States.

The Goodman concurrence also would find a "direct effect" where pursuant to a longstanding and consistent course of dealing between the contracting parties, the sovereign in fact had made contractual payments from its New York accounts. Id. at 1147. Once again, this view would have no impact on the outcome here: there was not a single instance of any of the respondents performing any acts in the United States that had anything to do with their contracts with UWT.

Petitioner's assertion that the court of appeals decision conflicts with Walter Fuller Aircraft Sales, Inc. v. Republic of Philippines, 965 F.2d 1375, 1387 (5th Cir. 1992), Pet. at 9-10, is equally without merit. In Walter Fuller, the sovereign effectively committed itself to contractual performance in the United States. There, the Philippine Presidential Commission on Good Government (the "PCGG") seized an airplane that had been leased to a Philippine corporation, and sold it to Fuller, an American corporation. In the deed of sale, the PCGG made an explicit promise "to defend and hold harmless [Fuller] from any and all claims of all persons whosoever, including but not limited to adverse claims . . . ." 965 F.2d at 1378. After the true owner of the airplane brought a quiet title action in Arkansas, Fuller sued the PCGG in Texas to recover its costs of defending the Arkansas suit. The district court held that it had subject matter jurisdiction over claims against the PCGG, and the Fifth Circuit affirmed. Id. at 1377, 1386-87. Relying on the deed of sale, the Fifth Circuit held that the PCGG had contractually agreed to defend Fuller in the Arkansas suit, and that the PCGG's breach had caused a direct consequence – Fuller providing its own defense – in the United States. Id. at 1387. Here, by contrast, respondents did not agree to do anything in the United States and so, their alleged breach did not cause any direct consequence in this country.

UWT relies on one other case, a district court decision never tested on appeal, AMPAC Group, Inc. v. Republic of Honduras, 797 F. Supp. 973 (S.D. Fla. 1992). AMPAC upheld jurisdiction on grounds that the sovereign's acts allegedly had caused the United States plaintiff corporation to suffer damages from Honduras' breach of a contract to sell a cement plant to the plaintiff. Id. at 977.

The federal circuit courts, by contrast, have consistently ruled that mere financial loss suffered by a plaintiff in the United States is not enough to satisfy the direct effect requirement. Antares Aircraft, 999 F.2d at 36 (fact "that an American individual or firm suffers some financial loss from a foreign tort cannot, standing alone, suffice to trigger the exception"); Gregorian v. Izvestia, 871 F.2d 1515, 1527 (9th Cir.), cert. denied, 493 U.S. 891 (1989) ("[M]ere financial loss suffered by a plaintiff in the United States as the result of the action abroad of a foreign state does not constitute a 'direct effect' and therefore cannot by itself create subject matter jurisdiction under section 1605(a)(2)."); Zedan v. Kingdom of Saudi Arabia, 849 F.2d 1511, 1515 (D.C. Cir. 1988) (financial loss in the United States must be accompanied by "something legally significant" that happened in the United States for FSIA jurisdiction to attach); Grossman, 991 F.2d at 1385-86 (injury to General Electric in the United States did not qualify as "direct effect"); Maizus v. Welder Trust Reg., 820 F. Supp. 101, 104 (S.D.N.Y. 1993) (injury to United States corporation buying oil from Nigeria held not to be a sufficient basis for jurisdiction under FSIA).

Finally, the petition seeks review on grounds that transactions similar to those at issue here will become more and more frequent. Pet. at 14. If anything, this consideration counsels against review. The principal feature of this transaction is that the Crude Oil Contract specified that contractual payments had to be made in U.S. dollars, as is common in many international transactions. If that feature were sufficient to satisfy the "direct effect" requirement, then "'our courts [might be] turned into small 'international courts of claims[,]' . . . open . . . to all comers to litigate any dispute which any private party may have with a foreign state anywhere in the world.'" Verlinden v. Central Bank of Nigeria, 461 U.S. 480, 490 (1983) (quotation omitted). Because the direct effect requirement was designed to prevent, not to accomplish, such an expansion of federal subject matter jurisdiction, id., review is not warranted on this basis.

II.

Petitioner's third issue, concerning the "six million dollar liability" petitioner allegedly "incurred . . . in the United States", Pet. at i, Question 3, is not presented by this record. In the district court, UWT alleged that following respondents' loss of the bill of lading for the third shipment of oil, UWT was required to furnish ISAB with a $6 million contractual guaranty. The petition repeats this allegation, asserting that this alleged guaranty was "incurred" or "posted" in the United States. Pet. at i, Ques-

tion 3, id. at 7, 15. But the undisputed evidence established that ISAB rejected UWT's proffered guaranty. Because there is no factual predicate for this aspect of the petition, it should be denied.

Even if ISAB had accepted UWT's contractual guaranty, that fact would not support a grant of certiorari review. UWT offered no evidence that the guaranty had any connection with the United States: it did not show where the guaranty was issued or how it had any effect in the United States. Moreover, the guaranty arose from UWT's contract with ISAB, not from any of UWT's contracts with respondents. The guaranty therefore could not constitute an immediate consequence of respondents' actions under those contracts, as both lower courts correctly held. App. at 12, 24.

In light of the complete absence of any proven connection between the alleged guaranty and the United States, UWT's reliance on Walter Fuller is misplaced. There, the sovereign had agreed, and was called upon, to perform in the United States. 965 F.2d at 1386-87. In addition, even viewed in its best light, the alleged UWT guaranty was a contingent liability that would not constitute a "direct effect." Grossman, 941 F.2d at 1385-86. When and if that liability ever became certain, it would place UWT on the same footing as a United States plaintiff claiming injury or loss in this country – a footing that the circuit courts have uniformly rejected as sufficient to constitute a "direct effect." See supra at 9-10.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted this 22d day of December, 1994.

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